INDEX.

PAGE

Opinion Below 3

Jurisdiction 4

Statutes 5

Statement of Facts 7

Assignment of Errors 9

Summary of Argument 16

Argument 17

Point I.

The Supreme Court of California Erred in Deciding That Section 9a of the Alien Land Act, and Section 1983 of the Code of Civil Procedure Were Valid Exercises of Legislative Power 17

A. By so deciding said court held that solely by reason of the allegations in the indictment that he is an alien ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural land, defendant H. Doi was required to prove he was a citizen or eligible to citizenship, and the burden was upon him to do so 17

B. By so deciding said court held that the prosecution need not prove the *corpus delicti* or the two elements constituting the crime charged, viz.: (1) The alienage or ineligibility to citizenship of H. Doi, and (2) possession of agricultural land by him, but only need prove the second element 20

PAGE

C. By so deciding the court held that section 9a of the Alien Land Act, and section 1983 of the Code of Civil Procedure established a "rule of convenience," that is, the rule that when the negative of the issue does not readily permit of direct proof, or where the facts come more immediately within the knowledge of the defendant,—the *onus probandi* rests upon the defendant and the prosecution need not prove such facts.. 21

D. By so deciding the court necessarily held that there is a rational and reasonable connection or relation between the fact proven (that defendant Doi was in possession of agricultural land) and the fact presumed (that he was an alien ineligible to citizenship)..... 23

Authorities Supporting Appellants' Contentions..... 24

Motion to Dismiss Order Allowing Appeal Should Be Denied.... 51

TABLE OF CASES AND AUTHORITIES CITED.

CASES. PAGE

Bailey v. Alabama, 219 U. S. 219 48

Brightman v. U. S., 7 Fed. (2d) 532 28

Brinkerhoff Ferris Trust & Savings Co. v. Hill (1930), 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107, 19 S. W. 2d 746, 323 Mo. 180 52

Broad River Power Co. v. State of S. Carolina ex rel. Daniel (1930), 50 S. Ct. 401, 281 U. S. 537, 74 L. Ed. 1023 52

Cumberland Coal Co. v. Bd. of Revision of Tax Assessments in Greene County (Va. 1931), 52 S. Ct. 48, 302 Pa. 179 52

Ex parte Smith, 218 Pac. 708 32

Hall v. Johnson, 169 Pac. 515, 87 Ore. 21 32

Hammond v. State, 84 N. E. 416, 78 Ohio St. 15 43

In re Opinion of Justices, 94 N. E. 1044; 208 Mass. 619 30

John P. King Mfg. Co. v. City Council of Augusta (Ga. 1928), 48 S. Ct. 489, 277 U. S. 100, 72 L. Ed. 801 52

Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215; 73 L. Ed. 575 ..... 44, 49

McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 499, 60 L. Ed. 899 ..... 18, 27, 49

Miller v. Schoene (Va. 1928), 48 S. Ct. 246, 276 U. S. 272, 72 L. Ed. 568 52

Mobile Railroad v. Turnipseed, 219 U. S. 35 (49 Sup. Ct. Rep. 176) 47

O'Neill v. U. S., 19 Fed. (2d) 322 28

People v. Cannon, 34 N. E. 759, 139 N. Y. 32 43

People v. Cuff, 122 Cal. 589, 592 38

People v. Frey, 165 Cal. 140, 131 Pac. 127 ..... 22, 24, 26

People v. Lyon, 27 Hun. 180 43

People v. Osaki, 209 Cal. 169, 286 Pac. 1025 ..... 21, 24

PAGE

People v. Quarez, 196 Cal. 402, 238 Pac. 363.....20, 21, 23, 24, 25

People v. Toynbee, 20 Barb. 168..... 42

People v. Velasquez, 70 Cal. App. 362, 233 Pac. 359..... 25

Simpkins v. State, 249 Pac. 168.....32, 33

State v. Beswick, 13 R. I. 211, 36 Am. Rep. 102.....41, 42

State v. Divine, 4 S. E. 477, 98 N. C. 778..... 30

State v. Grimmett, 193 Pac. 380, 33 Idaho 203..... 30

State v. Lapointe, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212 .....19, 35

State v. Momberg, 103 N. W. 566..... 43

State v. Potello, 119 Pac. 1023..... 43

State v. Wilson, 1 Atl. 415, 15 R. I. 180..... 42

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445, 73 L. Ed. 884.....44, 46, 49

Wynehamer v. People, 13 N. Y. 378..... 42

AUTHORITIES.

Alien Land Act, State of California (Stats. 1921, p. 83; Stats. 1923, p. 1020; Stats. 1927, p. 880).....5, 7

Alien Land Act, State of California, 1927, Section 9a (Stats. 1927, p. 880.....5, 7, 9, 20, 25

17 California Law Review 565, 575..... 45

17 California Law Review, 577, 578..... 46

85 California Decisions, 666; 22 Pacific 2nd Series, 718.....3, 9

Code of Civil Procedure, Section 1983.....5, 10, 20

Constitution of California, Article I, Section 13..... 23

Constitution of United States, Fourteenth Amendment, Section 1 23

Judicial Code, Section 237, amended..... 53

13 Pacific 2nd Series, 803.....3, 9

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1933
No. 487.

George Morrison and H. Doi,
Appellants,

vs.

The People of the State of California,
Respondents.

BRIEF FOR APPELLANTS.

This is an appeal from the decision of the Supreme Court of the State of California, rendered June 1, 1933, affirming the judgment of the Superior Court of the County of San Diego.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is reported in 85 California Decisions at page 666; 22 Pacific 2d Series, page 718.

No opinion was delivered by the Superior Court of the County of San Diego, but the District Court of Appeal, Fourth Appellate District, delivered an opinion, found in 13 Pacific 2d Series, page 803.

JURISDICTION.

Pursuant to Rule 12 (1) and amendments thereto, of the rules of this court, appellants submitted a statement showing that the appeal was timely taken, that the judgment from which the appeal was prosecuted was final and rendered by the highest court in which a judgment in the action could be had, that there was drawn into the question the validity of a state statute, and that the decision was in favor of its validity.

Appellants also showed that the constitutional questions involved in this appeal were timely and sufficiently raised in the courts below, and that the jurisdiction of this court extends to a determination of the nature of the transaction as well as the validity of the statute, as applied, under the Federal Constitution.

After the filing of the statement as to jurisdiction above referred to (reference to same being hereby made), respondent filed a motion to dismiss the order of the Supreme Court of California allowing the appeal, and further, filed a statement disclosing grounds making against the jurisdiction of this court. Thereafter appellants filed an amendment to the statement as to jurisdiction, which amendment is printed with the original statement (reference to same being hereby made), and cited additional cases believed to sustain the jurisdiction of this court, and cited statutory provisions sustaining such jurisdiction (p. 13, Statement as to Jurisdiction).

On November 6, 1933, this court rendered an order advancing and assigning this case for argument, December 11, 1933, and postponing further consideration of jurisdiction and motion to dismiss, to the hearing on the merits.

STATUTES.

The state statute whose validity as applied is drawn into the question is Section 9a of the Alien Land Act of the State of California, as adopted in 1927 (Stats. 1927, p. 880), being a portion of the Alien Land Act of the State of California (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 880; and Section 1983 of the Code of Civil Procedure of the State of California, as adopted in 1927.)

Section 9a of said Alien Land Act (Stats. 1927, p. 880) is as follows:

> "In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, *and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.*" (Italics supplied.)

Section 1983 of the Code of Civil Procedure is as follows:

> "Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or

the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

STATEMENT OF FACTS.

The undisputed facts of the case are as follows:

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of the State of California (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 880). The indictment alleged that on or about the 27th day of August, 1931, defendants did wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, by unlawful means, to bring about and accomplish the possession, enjoyment, use, cultivation and occupation for agricultural purposes by defendant H. Doi, and thereafter to continuously keep and maintain the defendant H. Doi in such possession, enjoyment, use, cultivation and occupation for agricultural purposes, and to the use and beneficial interest of said H. Doi, of certain land situated in the County of San Diego, which land was agricultural land; that defendant H. Doi is an alien ineligible to citizenship, and was not authorized by law or any treaty between the United States and the Empire of Japan, or any other nation or country, to acquire, possess, enjoy, use, cultivate or occupy real property, nor have either in whole or in part any beneficial use of or interest in real property for agricultural purposes.

It further alleges, while the conspiracy was in effect, to wit, on or about August 13, 1931, and in furtherance of and to accomplish and effect the purposes and objects thereof, the defendants did the following acts, viz: That defendant George Morrison put the defendant H. Doi in possession of, and did permit, aid and encourage H. Doi to go into possession of and to use, enjoy, cultivate and

occupy said land, and that said H. Doi did go into possession of said land and did use, enjoy, cultivate and occupy same, and did raise and harvest crops thereon for his own use and benefit, contrary to the statute and against the peace and dignity of the people of California. Trial by jury was waived, with the consent of the district attorney, and the action was tried before the court. The only evidence introduced consists of the following stipulation:

"It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, and encourage the said H. Doi to go into possession of, and use, enjoy, cultivate and occupy the said land, and said H. Doi did go into pos-

session of said land, and did use, enjoy, cultivate and occupy same, and did raise and harvest crops thereon for the use and benefit of said defendants and each of them."

It was on this stipulation and the allegations in the indictment that the trial court found the defendants guilty. An appeal was taken to the District Court of Appeal of the State of California, Fourth Appellate District (13 Pac. 2d, p. 803), and the case was transferred to the Supreme Court of California after decision by said Court of Appeal, and decision rendered by the Supreme Court (85 Cal. Dec., p. 666 (22 Pac. 2d, p. 718)), affirming the judgment of the trial court, although three of the seven justices dissented.

ASSIGNMENT OF ERRORS.

Appellants contend that in affirming the judgment of the trial court, the Supreme Court of California erred in the following particulars:

I.

That the court erred in holding that Section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure of the State of California, also adopted in 1927, were constitutional, and do not violate the Fourteenth Amendment to the Constitution of the United States.

II.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927,

p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, were constitutional, and do not violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

III.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States and of the State of California, of rights, privileges and immunities secured to the citizens of the United States by the Federal Constitution.

IV.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States of liberty and property without due process of law.

V.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive and deny to appellants and certain citizens and persons within the jurisdiction of the State of California the equal protection of the law.

VI.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which provide that in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of said Act, when the proof introduced by the State, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property, or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment, or information, alleges the alienage and ineligibility to United States citizenship of said defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon the defendant, are not in conflict with the due process law provisions of the Constitution of the United States and the Constitution of the State of California.

VII.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, without requiring any proof whatsoever to be first made by the State or the people, and solely by reason of an allegation in the indictment alleging the ineligibility to United States citizenship of said defendant,

are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

VIII.

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States as a prerequisite to the enjoyment and occupation, or a beneficial interest in real estate in California, for agricultural purposes, are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

IX.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, or statutes of the State of California, placing upon appellant H. Doi the burden of showing he is a citizen of the United States by birth or by naturalization, solely by reason of the allegation of his ineligibility to citizenship in the indictment, without any proof of any kind as to his citizenship or ineligibility to become a citizen, do not violate the due process clause and Section 13, Article I of the Constitution of California,

and are not discriminatory or in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

X.

The court erred in applying to the case the so-called "rule of convenience," that is, the rule that when the negative of the issue does not readily permit direct proof or where the facts come more immediately within the knowledge of the defendants, the *onus probandi* rested upon the appellants.

XI.

The court erred in holding that the burden of showing that appellant, H. Doi, was a citizen of the United States or eligible to become a citizen, a fact that was part of the *corpus delicti* and must be proven before a conviction could be had, was not upon the prosecution or appellee, but was upon the appellant.

XII.

The court erred in holding that under Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, there was a rational connection between the facts proved and the ultimate facts presumed.

XIII.

The court erred in holding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats., p. 880) and Section 1983 of the Code of Civil Procedure, also adopted

in 1927, did not, by casting upon appellant the burden of proving citizenship or eligibility to citizenship, compel said appellant, H. Doi, to be a witness against himself.

XIV.

The court erred in holding and deciding that appellant, H. Doi, solely by reason of the allegation in the indictment that he was an alien, ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural property, was required to prove that he was a citizen either by birth or naturalization.

XV.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, should cast upon appellant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, as a prerequisite to the enjoyment and occupation of or a beneficial interest in real estate in California, for agricultural purposes, are not discriminatory and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XVI.

The court erred in holding that Section 9a of the Alien Land Act (Stats. 1927, p. 880) establishes a "rule of evidence."

XVII.

The court erred in deciding there was a natural and rational evidentiary relation between the facts proved and those presumed under Section 9a of the Alien Land Act.

XVIII.

The court erred in holding that the provisions of Section 9a of the Alien Land Act (Stats. 1927, p. 880), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the State, under the provisions of such Act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or interest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are valid, and the enactment of such section was a valid exercise of the power of the Legislature.

XIX.

The court erred in holding that the Legislature by statutory enactment has cast the burden upon those whose eligibility is challenged, in the name of the State, of proving such eligibility.

XX.

The court erred in ordering judgment to be entered affirming the judgment of the Superior Court of San Diego, California, after judgment in District Court of Appeal, Fourth District.

SUMMARY OF ARGUMENT.

I. THE SUPREME COURT OF CALIFORNIA ERRED IN DECIDING THAT SECTION 9a OF THE ALIEN LAND ACT, AND SECTION 1983 OF THE CODE OF CIVIL PROCEDURE, WERE VALID EXERCISES OF LEGISLATIVE POWER.

A. By so deciding the court held that solely by reason of the allegation in the indictment that he is an alien ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural land, defendant H. Doi was required to prove he was a citizen or eligible to citizenship, and the burden was upon him to do so.

B. By so deciding said court held that the prosecution need not prove the *corpus delicti* or the two elements constituting the crime charged, viz: (1) the alienage or ineligibility to citizenship of H. Doi, and (2) possession of agricultural land by him—but only need prove the second element.

C. By so deciding said court held that Section 9a of the Alien Land Act and Section 1983 of the Code of Civil Procedure established a "rule of convenience," that is—the rule that when the negative of the issue does not readily permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the *onus probandi* rests on him, and the prosecution need not prove such facts.

D. By so deciding the court necessarily held that there is a rational and reasonable connection or relation between the fact proven (that defendant Doi was in possession of agricultural land) and the fact presumed (that he was an alien ineligible to citizenship).

ARGUMENT.

POINT I.

The Supreme Court of California Erred in Deciding That Section 9a of the Alien Land Act, and Section 1983 of the Code of Civil Procedure Were Valid Exercises of Legislative Power.

This conclusion was reached by applying the rule of *ab inconvenienti,* commonly known as *rule of necessity and convenience,* instead of the rule that there shall be some *rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.*

A. By so Deciding Said Court Held That Solely by Reason of the Allegations in the Indictment That He Is an Alien Ineligible to Citizenship, and the Introduction of Proof That He Had the Enjoyment, Use, Cultivation and Occupation of Agricultural Land, Defendant H. Doi Was Required to Prove He Was a Citizen or Eligible to Citizenship, and the Burden Was Upon Him to Do So.

Under Section 9a therefore, the only fact necessary to prove is that defendant Doi is in possession of agricultural land, and the burden of proving that he is ineligible to citizenship is then cast upon him, or which amounts to the same thing, the defendant is then *presumed to be ineligible to citizenship.*

It therefore clearly appears that there is no rational or reasonable connection or relation between the fact proven and the fact presumed. The fact that a person is in possession of agricultural lands of the state does not in the least tend to prove that he is a member of any particular race, much less a race, the members of which are denied citizenship under our laws.

It is not within the province of the Legislature to declare an individual guilty or presumptively guilty, of a crime, and this rule has been universally followed.

McFarland v. American Sugar Refining Co., 241 U. S. 79.

The presumption created by Section 9a has no foundation except for tacit facts. This section authorizes the jury to convict unless defendant Doi assumes the burden of proving himself eligible to citizenship to their satisfaction.

It casts upon the defendant Doi the burden of negativing one of two elements of the crime charged against the defendant, viz: the alienage or ineligibility to citizenship of the defendant Doi—without the necessity of any proof being offered as to this element.

The mere allegation in the indictment really has the effect of shifting the burden of proof so that defendant Doi is required to prove his innocence.

The validity of legislation creating presumptions similar to that provided by Section 9a, has frequently been before the courts of California and other jurisdictions *with the result that it has uniformly been declared invalid.* The authorities uniformly hold that in order to sustain such legislative presumption as that created by Section 9a of said Act *it is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed.*

In the present case there is no semblance of such a connection. The mere fact that a defendant is brought into court and proof is made that he is using, or is in possession of real property susceptible of producing agricultural products is made a basis of a presumption that he is an alien ineligible to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship. *There is not the slightest connection or relationship between possession of real property and the alienage or citizinship of the person in its possession.*

According to the unbroken line of authorities, a presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power.

State v. Lapointe, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212.

B. By so Deciding Said Court Held That the Prosecution Need Not Prove the Corpus Delicti or the Two Elements Constituting the Crime Charged, viz: (1) The Alienage or Ineligibility to Citizenship of H. Doi, and (2) Possession of Agricultural Land by Him, but Only Need Prove the Second Element.

The crime charged against defendant consists of two elements, (1) the alienage and ineligibility to citizenship of H. Doi, and (2) the possession of agricultural land by him. The second of these two elements *was proven but there was no evidence whatsoever in support of the first element*—alienage and ineligibility to citizenship of H. Doi.

It was held in

People v. Quarez, 196 Cal. 402, 238 Pac. 363,

which was a prosecution under an information charging the defendant with having in his possession a revolver capable of being concealed, defendant being at the time a foreign born person and not a naturalized citizen of the United States; that the *corpus delicti* of the offense consisted of two elements—(1) the possession of a concealed weapon and (2) by a foreign born and unnaturalized person; and that if the proof of the prosecution were to stop with the showing that the defendant had possession of a concealed revolver of the prohibited type, *no offense would have been proven; the prosecution had to prove, in addition thereto, that the defendant was an alien.*

Section 9a and Section 1983 of the Code of Civil Procedure were enacted by the Legislature after the Quarez

decision, to try to make it easy to convict in that class of cases, and by the case of

People v. Osaki, 209 Cal. 169, 286 Pac. 1025,

the Supreme Court of California endeavored to sustain this class of legislation; however, the Osaki case *is not binding here as the evidence in that case showed defendant Osaki was an ineligible alien, without the necessity of invoking the aid of the burden of proof provisions of the amendment to the Alien Land Act.* The court was not called upon to decide the constitutionality of Section 9a in that case as the evidence brought the case within the provisions of Section 9b, with which we are not here concerned.

C. By so Deciding the Court Held That Section 9a of the Alien Land Act, and Section 1983 of the Code of Civil Procedure Established a "Rule of Convenience," That Is, the Rule That When the Negative of the Issue Does Not Readily Permit of Direct Proof, or Where the Facts Come More Immediately Within the Knowledge of the Defendant,—the Onus Probandi Rests Upon the Defendant and the Prosecution Need Not Prove Such Facts.

It was ultimately decided by the Supreme Court of California in the case of

People v. Quarez, 196 Cal. 404, 238 Pac. 363,

that the foreign nativity of the defendant, being an essential element of the *corpus delicti, did not come within the rule of "ab inconvenienti" and that this element must be proven by the prosecution.*

This case further thoroughly discussed the contention of the Attorney General to the effect that a slight amount of proof only is necessary to satisfy the law when proving a negative in a case, where a fact is peculiarly within the knowledge of the other party; and also that if the evidence to prove a fact is chiefly, if not entirely, within the defendant's control, the burden rests on him to produce the evidence.

The court there held that these rules enunciated a correct principle, and that they have been consistently followed in this state *in those cases involving the unlawful practice of medicine without a license, or in liquor or other cases where a license is required by law, and it is easy for the defendant to produce a license if he has one*— but the court held that this exception to the general rule of *ab inconvenienti* has *in this state been confined to* that *particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the non-existence of* A LICENSE—and the court said the rules should not be applied so as to make less imperative, in the enforcement of the law, the duty of the prosecution to establish the charge. That this *exception to the general rule is not the universal application in the State of California in criminal cases, and cited*

People v. Frey, 165 Cal. 140, 131 Pac. 127,

as an authority.

In the Quarez case, *supra,* quoting from the Frey case, and referring to the rule of *ab inconvenienti,* the court said:

> "Nor does this case come within the rule that negative allegations regarding matters peculiarly within the knowledge of the defendant *need not be proven. That is a special rule applicable to such prosecutions as those for practicing some profession or following some calling without the license provided therefor by law."* (Italics supplied.)

D. By so Deciding the Court Necessarily Held That There Is a Rational and Reasonable Connection or Relation Between the Fact Proven (That Defendant Doi Was in Possession of Agricultural Land) and the Fact Presumed (That He Was an Alien Ineligible to Citizenship).

If there is no rational or reasonable connection between the fact proven and the fact presumed—*the presumption is invalid,* being in violation of the Fourteenth Amendment of the United States Constitution; *and is discriminatory,* depriving defendant of the due process of law and the equal protection clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and of Section 13, Article I, of the Constitution of California.

AUTHORITIES SUPPORTING APPELLANTS' CONTENTIONS.

As heretofore stated, the Supreme Court of California held Section 9a constitutional by holding that it came under the rule of *ab inconvenienti,* but failed to pass upon the contention of appellants that in order for the section to be constitutional it is essential that there shall be *some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.* In support of their contention that the rule *ab inconvenienti* did not apply and was not applicable to the case at bar, but applied only to cases where the prosecutions were those for *practicing some profession or following some calling without the license* provided therefor by law, appellants cite the following authorities:

People v. Quarez, 196 Cal. 404, 238 Pac. 363, and
People v. Frey, 165 Cal. 140, 131 Pac. 127,

both of which seem to hold squarely that the rule *ab inconvenienti* is limited in its application to prosecutions of persons charged with the violation of statutes regulating the practice of medicine and other professions and certain callings, which provide that a license shall first be obtained before any person may engage in the practice of such professions or callings. The Quarez case was a unanimous opinion of the Supreme Court of California, and the question was squarely determined. The case of

People v. Osaki, 209 Cal. 169, 286 Pac. 1025-1036,

is relied on by appellee and is cited by the Supreme Court of California as authority for its decision in holding Section 9a constitutional. That case, however, considered both sections 9a and 9b and the evidence there was sufficient to show that Osaki was a Japanese and of the Japanese race; in fact the court said that both parties tried the case on the theory that the defendant was a Japanese and of the Japanese race. Therefore, the case was really decided on the ground that the evidence produced by the prosecution was sufficient in itself to show the accused was an ineligible alien without the necessity of invoking the aid of burden of proof provisions of said amendment, viz: Section 9a, and the validity of said burden of proof provision, viz: 9a, was never considered at any great length. In that case the Supreme Court further would not extend the rule of convenience of burden of proof to common law crimes generally designated as *maulum in se* nor to all crimes *maulum prohibitum.* It only applied the rule to the amendments of the Alien Land Act. The court in the Osaki case spent a great deal of time showing that the rule *ab inconvenienti* was recognized a long time ago in England and quoted from several of the old English cases. The case of

People v. Velasquez, 70 Cal. App. 362, 233 Pac. 359,

is also cited by the Supreme Court of California in its opinion as supporting its view that the application of the rule of convenience is sound in reason and is sustained by the greater weight of authority. However, the Quarez case (*supra*) was decided after the Velasquez case, and in the Velasquez case the prosecution really proved that the

defendant was foreign born, the point there decided was that it was not necessary after proving he was foreign born, to further show he had never been naturalized.

Appellee will no doubt cite many cases to sustain its contention that the rule of inconvenience is applicable, but some of these cases were discussed in the Quarez case, and after considering them the court said that the rule *ab inconvenienti* was an exception to the general rule, and in California has been confined to that particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the non-existence of a license required by law. In such cases the burden of the issue is put upon the defendant, because it is easy for him to meet it, but *the court said the rule should not be applied so as to make less imperative in the enforcement of the law, the duty of the prosecution to establish the charge that the rule was an exception to the general rule.*

The Supreme Court of California in its opinion in the case at bar states that the Quarez case leans heavily upon

People v. Frey, 165 Cal. 140, 131 Pac. 127,

and shows that the Frey case was adopted by a bare majority of the court. However, the Quarez case was adopted by a unanimous court. It will be noted that the opinion of the Supreme Court in the case at bar was also adopted by *a bare majority,* four of the justices signing the opinion, and three dissenting, with an opinion. The dissenting opinion seems to be the most logical and seems to be supported by competent authorities, and appellants feel that the dissenting opinion is the opinion that should be followed by this court.

The following cases squarely support appellants' position. We therefore cite them briefly:

McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 499, 60 L. Ed. 899,

involved a statute of Louisiana which purported to impose penalties for monopolies and conspiracy in restraint of trade. By this statute it was provided that

> "Any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State, shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce and upon conviction thereof shall be subject to a fine. . . ."

The Supreme Court of the United States held that this presumption was invalid as being in violation of the Fourteenth Amendment and, speaking through Mr. Justice Holmes, disposed of the case as follows:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. *It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'* (Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province

of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." (Italics supplied.)

Brightman v. U. S., 7 Fed. (2d) 532,

involved a prosecution under the Harrison Narcotic Act. The Circuit Court of Appeals for the Eighth Circuit held that the prosecution was bound to prove, as an essential element of its case, that the narcotics had been purchased within the district. Although the statute provided that the possession of drugs should be *prima facie* evidence of the violation of the Act, it was held that:

"There is in our judgment no such rational connection between the fact of the possession of morphine in the western district of Oklahoma and the fact of a purchase of it in that same district as to make the former *prima facie* evidence of the latter. Common experience does not support such a presumption."

O'Neill v. U. S. 19 Fed. (2d) 322, was also a

prosecution for a violation of the Harrison Narcotic Act. In that case the defendant was convicted of the offense of selling drugs without paying the special tax required by the Act. The prosecution relied upon the *prima facie* pre-

sumption which was claimed to arise under the statute from the possession of unstamped drugs. The court said:

> "The general principle is well recognized that even in criminal prosecutions, Congress or a State Legislature may with certain limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. 12 C. J. p. 823, Sec. 285. The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate; and the accused must not be deprived of a proper opportunity to present his defense to the main fact so presumed and have the case submitted upon all the evidence to the jury for its decision."

After citing and quoting from numerous authorities in support of this rule, the conclusion of the Court was expressed as follows:

> "In our opinion, Congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the first penal provision of section 1."

We have cited the federal authorities first of all, because the statute under discussion infringes the due process clause of the federal constitution. But the decisions of the state courts are to the same effect and require, as an element of due process, that in a criminal case a presumption of guilt or any presumption unfavorable to the defendant upon any issue, must be supported by a rational connection between the fact proved and the statutory in-

ference drawn therefrom, and hold that in the absence of such rational connection the statute is void.

State v. Divine, 4 S. E. 477, 98 N. C. 778,

was a prosecution for the violation of a statute prohibiting the negligent killing of livestock by a railroad. The statute provided that when stock was killed or injured by a running engine in certain counties, proof of that fact should be *prima facie* evidence of the negligence of certain specified officials of the railroad company. The statutory presumption was held to be unconstitutional and void as being unsupported by any reasonable connection between the proof and the inference of guilt.

In another case the Justices of the Supreme Judicial Court of Massachusetts delivered an opinion on the validity of a proposed act providing that working more than eight hours in any one day should be *prima facie* evidence of the violation of a statute forbidding persons from working more than eight hours per day, except that employees given a Saturday half holiday might work more than eight hours on other days of the week. It was held that this presumption would be invalid as being contrary to fundamental principles of criminal law.

In re Opinion of Justices, 94 N. E. 1044; 208 Mass. 619.

In

State v. Grimmett, 193 Pac. 380, 33 Idaho 203,

the defendant was convicted of grand larceny of a certain cow. The trial court instructed the jury, in accordance with the provisions of a state statute, that any person who slaughters cattle must retain in his possession the hide of

such cattle with the ears attached thereto for a period of thirty days and that proof of the failure of any person to do so should be *prima facie* evidence of the commission of the crime of grand larceny as to the cattle slaughtered.

After citing many authorities, the Supreme Court of Idaho stated the rule as follows:

> "So long as the evidence is of itself material and relevant, the statute may make it *prima facie* proof of the ultimate fact which it tends to establish, and may thus shift the burden of evidence. Where, however, there is no connection or rational relationship between the fact proved and the ultimate fact to be presumed, such a statute shifts the burden of proof, and in a criminal case deprives the defendant of the protection of his constitutional guaranties."

Applying this rule to the case before the Court, its conclusion was stated as follows:

> "The act of a person in disposing of the hide of an animal within 30 days after it has been slaughtered by him is an act innocent in itself, except as made otherwise by statute. It may be necessary in the face of a falling market in order to prevent financial loss. It does not tend to prove that the animal slaughtered belonged to someone else or that it had been stolen. If the statute had referred only to the alteration of the brands upon the hide, or the defacement of other marks thereon, possibly there might have been some connection between the act and the fact to be presumed. But the statute goes further and declares that the mere fact of failing to retain possession of a hide from a slaughtered animal for 30 days is *prima facie* proof of grand larceny. Under this statute one could be convicted without any evidence that any

cattle of any description had been stolen from any person. The instruction, if followed by the jury, relieved the state from the necessity of offering any evidence of the *corpus delicti*. It deprived the defendant of the benefit of any presumption of innocence, and required him to take the burden, not only of proving his own innocence, but perhaps of proving that the crime had not been committed."

Other cases which hold statutory presumptions to be unreasonable and therefore unconstitutional and void are:

Hall v. Johnson, 169 Pac. 515, 87 Ore. 21;

Ex parte Smith, 218 Pac. 708;

Simpkins v. State, 249 Pac. 168.

Ex parte Smith, supra, involved a prohibition statute of Oklahoma, which, among other things, provided that any mash found in any house or building should *prima facie* be deemed to have been made or fermented by, and to be the property of the person in actual possession or control of the house or building. The court held the presumption to be unconstitutional and void, saying in this respect:

"The rule of presumptive evidence attempted to be established by this act is based on a presumption that the person in possession of the premises and its inclosure where the things prohibited may be found had knowledge of their existence and location, and upon that presumption bases another presumption that they belonged to him and that he intended to use them for an illegal purpose. This violates the rule well established everywhere that one presumption cannot be based upon another. * * *

"* * * It could hardly be said that there was a presumption of law that the person in possession of the ranch placed it there. All the authorities agree that such a statutory rule of evidence is a dangerous one, and that it should not be applied where it has no intrinsic evidential force or where its application will impair some positive statutory or constitutional right."

Simpkins v. State, supra, was a prosecution for driving an automobile while intoxicated. The state statute provided that if a person driving the automobile had on or about his person any intoxicating liquor, that fact should constitute *prima facie* evidence of such person having driven while intoxicated. After discussing the constitutional limitation in question, the Court held the presumption to be void and said:

"It is apparent that the presumption here created violates this limitation, since in order to draw the conclusion of intoxication from the fact of the driver of an automobile having intoxicating liquors on his person or in said vehicle, there must first be the inference that the driver had used the intoxicants, and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. The presumption of intoxication fixed by the statute is also contrary to the fundamental requirement that the inference or presumption of intoxication arising from the possession of the person or in the vehicle of liquors must be a probable or natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote. The fact of possession of intoxicants on the person or in the vehicle by one

charged with the offense of driving an automobile upon the highway is properly admissible in evidence against an accused. Its weight or evidentiary value will depend upon the special circumstances, but certainly no conviction should be had of a person so charged upon the bare fact that he had intoxicants on his person or in the vehicle driven by him, where there is no other evidence of intoxication such as improper driving or irrational conduct."

In view of the uniform current of the authorities on this subject, there is no room for doubt or discussion as to the test which must be applied to any statutory presumption in a criminal case. Unless there be a connection between the fact proved and the inference, which connection is based upon reason and supported by experience, the statute is unconstitutional. *In the present case there is no semblance of any such connection. The mere fact that a defendant is brought into court and that he has used or enjoyed real property is made the basis of a presumption that he is an alien ineligible to citizenship. This is the necessary effect of Section 9a of the Alien Land Law and of Section 1983 of the Code of Civil Procedure. There is no possibility of any rational claim that the possession of land by a defendant gives rise to any inference one way or the other as to whether he is a citizen or alien, nor as to whether he is an alien who is eligible to citizenship or one who is not so eligible. It might as well be presumed from the mere fact of occupancy that the defendant had red hair or was a thief.* Further discussion of the point would, it seems to us, be useless. Under the authorities cited, the statute violates the guaranty of due process and of the equal protection of the laws.

We wish further to call the Court's attention to the case of

State v. La Pointe, 123 Atl. (N. H.) 692.

That case involved a statute which prohibited the possession of intoxicating liquor which had been illegally acquired. The statute provided that the possession of any intoxicating liquor should be *prima facie* evidence of the violation thereof. *The trial court instructed the jury that if they found that possession was proved, they must also find that the possession was illegal. No evidence was introduced upon point by the defense.* After a thorough discussion of the legal question involved, the Supreme Court held that if the statute were construed as supporting the instruction and therefore as *binding the jury to find against the defendant in the absence of evidence on his behalf, the statute was unconstitutional as a denial of the provisions of the state constitution guaranteeing the right of trial by jury in a criminal case.*

At the outset of its discussion, the court pointed out that it was not considering the validity of the presumption under the due process clause of the federal constitution. That provision would be complied with, the court conceded, if the presumption was supported by a rational connection between the fact proved and the ultimate fact presumed. But the Court pointed out that entirely irrespective of the reasonableness of the presumption and irrespective also of the validity of the statute under the due process clause, the Legislature could not constitutionally provide for a presumption of general guilt, or a presumption adverse to the defendant upon any issue in a criminal case, where the defendant chose to stand mute and offer no evidence.

The Court reviewed the earlier cases at some length and pointed out that in those decisions where statutory presumptions had been upheld in criminal cases, this result had been reached on the view that the jury were allowed to weigh the *prima facie* evidence. The Court then went on to point out that the defendant is entitled to more than a mere opportunity to explain a *prima facie* presumption, for he is guaranteed the right to have every issue of fact submitted to the jury. In this regard the Court said:

> *"It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the proposition that the state must prove a case against him."* (Italics supplied.)

The Court then points out the distinction between a *prima facie* presumption and a conclusive presumption. So-called "conclusive presumptions" are *in effect rules of substantive law,* and decisions dealing with this class of presumptions are not in point. The Court then discusses the suggestion that statutes of the kind here involved have to do only with matters of procedure. In this respect the Court says:

> "Rules of *prima facie* proof in civil causes, both statutory and common law, have been sustained upon the ground that they merely regulate the duty to go

forward with the production of evidence. 2 Wig. Ev. Sec. 1354; Spilens v. Company, 79 N. H. 326, 108 Atl. 808; Gaffney v. Coffey, 81 N. H. ....., 124 Atl. ..... But the caution that legislative power in this respect must be exercised subject to 'the limitations of evidence enshrined in the Constitution' (2 Wig. Ev. Sec. 1354) has not always been heeded. * * *

"It is only upon the ground that so-called rules regulating what shall constitute *prima facie* proof in such causes amount merely to regulations of this duty to go forward, that the statutes can be sustained. The basis for these decisions is manifestly the legislative power to regulate procedure in a reasonable way. They have no bearing upon a situation where such power is lacking. In many respects there is no such power over criminal proceedings. It can not be directly provided that the accused shall furnish evidence against himself. It, of course, follows that the same thing can not be done indirectly. A statute which depends for its validity upon a legislative power to compel a defendant to proceed at certain stages of the trial, or upon certain questions, cannot be upheld when the essential legislative authority is lacking.

"In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with the crime.

"Most courts that have sustained these statutes as binding the judgment of the jury have done so upon the theory that all the Legislature had undertaken to do was to prescribe a rule of evidence. As already pointed out, this is not the real purpose and effect of

the legislation. It seeks to compel a party to go ahead in the case, to produce evidence, or else have the fact found against him as matter of law. It is a rule of procedure, and undertakes to take from the defendant rights guaranteed to him by the Constitution.

"It is herein that these statutes are fatally defective. By what authority can the Legislature impose a burden upon the defendant for not producing evidence? One will search in vain through all the decisions for any answer. No doubt the statute gives the defendant full opportunity to present all the evidence, but that does not help the situation. These statutes were not designed for, and do not apply in, cases where other evidence upon the question is produced. They apply only to cases where there is no evidence save the statutory inference from fact A to fact B, and they say to the jury that the inference is inevitable. You must find fact B if you find that fact A is proved. * * *

"To stress this so-called privilege of the defendant to produce evidence, as so many courts have stressed it, is an entire perversion of the protection guaranteed to him. It is true it is his right to produce evidence, but it is equally true that he cannot be compelled to do so, either directly or indirectly."*

The Court also points out that the rule forbidding statutes of the class under discussion applies not only where there is a general presumption of guilt, but also where there is a presumption binding the jury in the ab-

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*In connection with the constitutional right of an accused person to stand silent and insist that the prosecution prove a case against him beyond a reasonable doubt, see *People v. Cuff*, 122 Cal. 589, 592.

sence of rebutting testimony, which is adverse to the defendant upon any issue involved in the case.

"If a part of the state's case may be conclusively established in this way, so may the whole of it. If the inference from possession to illegality is to be drawn as matter of law because there is no other evidence, so might the Legislature provide that possession shall be conclusively shown by the testimony of one witness, if there be no other evidence. In such a situation the jury would be told that the testimony required that they return a verdict of guilty. If in the present case the opportunity to take away the application of the statute by producing evidence satisfies the defendant's constitutional demands, so it would in the supposed case.

"It is his constitutional right not to produce evidence. Were it not for the array of cases denying the substance of this privilege, it would seem incredible that anyone could suppose that it could be invaded by any legislation, based upon a power to penalize the exercise of the right. *Giving to him the right to produce evidence, or not, is no substitute for his right not to produce it. The former is a privilege now generally conferred. But the latter is a fundamental right which neither Legislature nor courts are at liberty to impair.* Conferring the privilege to produce cannot limit or in any way affect the constitutional right not to produce.

"It may be that under certain circumstances an inference of fact can be permitted to be drawn from the defendant's failure to produce evidence, excluding any inference as to his own testimony. Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711 (Shaw, C. J.); State v. Grebe, 17 Kan. 458 (Brewer, J.). That no inference can be drawn from his own

failure to testify has been generally recognized to be the law. 3 Wig. Ev., Sec. 272. The denial of the latter rule in a few states (State v. Bartlett, 55 Me. 200; State v. Cleaves, 59 Me. 298; 8 Am. Rep. 422; Parker v. State, 61 N. J. Law, 308, 39 Atl. 651) is based upon the logical inference to be drawn from such conduct. In none of the cases is any reasoning advanced showing that the conclusion reached does not compel the defendant to 'furnish evidence against himself.' State bluntly, those decisions come to this: His exercise of his constitutional right not to testify is evidence of his guilt.

"It is not necessary to consider whether such a limitation upon the constitutional provision can be upheld in this state. Nor is it necessary to decide whether the authorities above referred to, holding that an inference may be drawn from the defendant's failure to produce other evidence, could be followed here. If it be conceded for the sake of the argument that such a distinction could be made, or even if it were conceded that an inference could be drawn from his own failure to testify, it would not affect the result in this case.

"If such an inference were permitted, it could only be one of fact. It would still be for the jury to say whether they would or would not draw it. As before stated, any attempt to direct how much or how little weight should be given to such an evidentiary situation would be a clear invasion of the powers committed to the department of government having exclusive jurisdiction over such matters. Neither the power nor the duties of courts can be lessened in this way.

"Construed as the state claims it should be, the provision that possession shall be *prima facie* evidence of illegality cannot be sustained as a valid exercise of legislative power." (Italics supplied.)

One of the leading cases to the same effect is

State v. Beswick, 13 R. I. 211, 36 Am. Rep. 102.

In that case a statute provided that it should be the duty of a jury impanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon proof that his place of business was notorious as a place where liquor was unlawfully kept for sale, or upon proof that the place was frequented by persons of bad or intemperate character, unless there should be other evidence to rebut or control it. The Supreme Court of Rhode Island held the statute to be void as depriving the defendant of his right to trial by jury, saying:

"What is meant by 'the judgment of his peers' is the judgment of a jury, and certainly he does not have the judgment of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the general assembly were to enact that if any person were generally reputed to be guilty of a murder it should be prima facie evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the judgment of

his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt." (Italics supplied.)

In the later case of

State v. Wilson, 1 Atl. 415, 15 R. I. 180,

the Court had under consideration a statute which did not compel the jury to convict upon proof of the character of the premises, but simply provided that the notorious character of the premises "should be evidence" of the existence of a nuisance. The Court points out the distinction between such a statute and the one involved in

State v. Beswick,

saying:

"The fault of the provision contained in State v. Beswick was that it made reputation *prima facie* evidence and thus made it a duty of the jury to convict on such evidence if unrebutted, whether satisfied by it of the guilt of the accused or not."

The doctrine of the *Beswick* and *La Pointe* cases has been approved by a long line of decisions, among which we cite the following:

People v. Toynbee, 20 Barb. 168;

Wynehamer v. People, 13 N. Y. 378;

People v. Lyon, 27 Hun. 180;
People v. Cannon, 34 N. E. 759, 139 N. Y. 32;
Hammond v. State, 84 N. E. 416, 78 Ohio St. 15;
State v. Momberg, 103 N. W. 566;
State v. Potello, 119 Pac. 1023.

In *People v. Cannon, supra,* the Court of Appeals of New York, after stating that the Legislature might under some circumstances provide for *prima facie* presumptions in criminal cases, said that this power was subject to certain definite limitations. It then described these limitations as follows:

> "The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary; and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper."

In *State v. Potello, supra,* the Court said:

> "Now, what is meant by the term '*prima facie*' as here used in the statute? If the meaning to be given it is that unless rebutted by other evidence, or discredited by circumstances, it becomes conclusive of the fact of guilt and to operate upon the minds of the jury as decisive of that fact, a meaning sometimes given the term (Kelly v. Jackson, 31 U. S. 622, 8 L.

Ed. 523; State v. Burlingame, 146 Mo. 207, 48 S. W. 72), then again we are of the opinion that the Legislature would have encroached upon the judiciary. That is to say, we would be of such opinion, if, upon the proof of the facts which the Legislature has declared shall be deemed a *prima facie* case of guilt even though unrebutted and unexplained, the jury would be required to find the accused guilty of the alleged offense, though they should not be convinced of his guilt beyond a reasonable doubt."

The Supreme Court of the United States has handed down two decisions which bear directly on the question at issue. The first of these is

Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215; 73 L. Ed. 575.

In that case the Supreme Court held to be unconstitutional a statute of Georgia which allowed a conviction of fraud on mere proof of insolvency, on the ground that the statutory presumption was not rational and that "the connection between the fact proved and that presumed is not sufficient."

Still later, and on May 27, 1929, the Supreme Court of the United States handed down its decision in

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445, 73 L. Ed. 884.

In that case it was held that a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision was unconstitutional. *This pronouncement of the Supreme Court, is based on the grounds that a state statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary or irrational.*

Finally, the whole question under discussion has been reviewed in two notes in the July, 1929, issue of the California Law Review (17 Cal. Law Review 565, 575). The authorities are fully discussed in those notes and the unconstitutionality of the 1927 legislation is demonstrated thereby.

Referring to the question as reviewed in 17 Cal. Law Review, 565, 575, we wish to call your attention to the following:

After discussing the illegality of *prima facie* presumptions which are not justified as a matter of reason, the annotator says:

> "The greatest assistance, however, which can be given the prosecution, and so the heaviest burden which can be put upon the defendant, under any system of law which provides for a judicial determination of the facts, consists in an outright shifting of the burden of proof from the prosecution, where the common law placed it, to the defendant, where Section 9a and 9b of the California Alien Land Law, as amended, place it in respect of at least one of the essential elements of the offense which the act creates. The language of the amendment is clear and umistakable, and leaves nothing to conjecture or doubtful interpretation. There is no question here of simple presumptions, of weighing presumptions, or of a *prima facie* case. *The burden of disproving ineligibility or alienage, both of which are essential elements of the offense charged, is placed upon the defendant; and unless he succeeds in disproving one of them, he must be convicted.* The offense, as defined by the statute and analyzed by the court, consists of three things: (1) being an alien; (2) being ineligible to citizenship by naturalization; (3) owning, leasing, or

enjoying the use of agricultural land in California. *Under Section 9a it is necessary for the state to prove nothing except the fact that the defendant owns or has leased farm land in California, and merely to allege that he is an ineligible alien.* Proof of owning or leasing the land (which in itself is not wrong, nor even prohibited), together with an allegation of two other facts, alienage and ineligibility to citizenship (neither of which is an offense in itself), constitutes the entire case for the state; and unless the defendant raises a reasonable doubt as to the ownership or the renting, which is the only thing which the state has attempted to prove; or disproves the charge of being an ineligible alien, to establish which the state need introduce no proof whatever, then nothing can save him from conviction." (Italics supplied.)

17 Cal. Law Rev., 577, 578.

As showing that a statute which imposes upon a defendant a heavier burden of proof than would normally rest upon him, is far more obnoxious to the constitution than a mere *prima facie* presumption, we call particular attention to the case of

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445,

already cited. That case involved a statute of Georgia which provided for liability of a railroad company for damages done by its locomotives or cars "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." As interpreted by the state court, this statute did not merely create a presumption which would be dissipated upon the

introduction of testimony, but operated to cast *upon the railroad company the burden of proving freedom from negligence.* Now the striking feature about this case is not only that it was a civil case (as to which the Legislature might create presumptions more freely than in criminal cases), but that the Supreme Court was confronted with its previous decision in *Mobile Railroad v. Turnipseed,* 219 U. S. 35, where it had held that a state legislature might provide for a statutory inference of negligence from proof of a collision. When the *Henderson* case first came before the Court on January 2, 1929, the Court summarily dismissed the appeal "for want of a substantial federal question on the authority of *Mobile Railroad v. Turnipseed,* 219 U. S. 35," (49 Sup. Ct. Rep. 176). A few weeks later, on January 21, 1929, a petition for rehearing was granted and the case was restored to the docket "as one in which the court finds that probable jurisdiction has been shown." (49 Sup. Ct. Rep. 186.) The case was argued on April 17th, and on May 27th the decision was handed down, *holding not only that the statute was void, but also that the Turnipseed case did not apply, because the Georgia statute did more than create a mere inference and, as interpreted by the state court, threw the burden of proof on the issue of negligence upon the defendant.* Distinguishing the two cases, the Court said:

> "That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. Gulf, M. & N. R. Co v. Brown, 138 Miss. 39, 66, 102 So. 855 *et seq.;* Columbus & G. Ry. Co. v. Fondren, 145 Miss. 679,

110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate."

It is quite clear, therefore, that if a state cannot create an irrational presumption, it cannot, a *fortiori, throw upon the defendant the burden of proof upon the mere production of evidence which has no rational connection with the issue as to which the burden is thus transferred. The present case must be decided on at least as favorable a basis as if the statute had said in so many words that the mere occupation of land by a defendant will result in a presumption that he is an ineligible alien.*

The present case is one where the statutory presumption is not justified by any rational connection between the fact proved and the inference drawn therefrom. The Supreme Court of the United States has uniformly held that in such a case the statute is void as constituting a denial of due process.

In

Bailey v. Alabama, 219 U. S. 219,

the statute involved a *prima facie* presumption of fraud upon proof of a mere breach of contract. The defendant was allowed to rebut the presumption. The fraudulent intent was difficult to prove, as it always is, and the knowledge with respect to the fraud lay peculiarly with the defendant. Nevertheless, the statutory presumption was held to be void.

In

McFarland v. American Sugar Refining Co., 241 U. S. 79,

the statute provided for a presumption of a conspiracy to restrain trade upon proof of payment within the state of a smaller price for commodities than was paid elsewhere. The existence of the conspiracy was necessarily within the peculiar knowledge of the defendants, they were allowed by the statute full opportunity to rebut the presumption, and the crime was in its nature difficult of proof. Yet the Supreme Court held the statute to be unconstitutional.

In

Manley v. Georgia, 279 U. S. 1,

the statute called for a prima facie presumption of fraud on the part of the directors of a bank upon proof of the insolvency of the bank. The directors could rebut, the fraud was necessarily difficult to prove and no one knew better than the defendants the facts which would determine the existence or nonexistence of the alleged fraud. Notwithstanding these facts the statute was held to be void.

Finally, in

Western Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445,

the case already discussed, the *defendant was allowed to show freedom from negligence, the facts were within its knowledge* and they were no doubt considered to be difficult of proof. But the statute was not saved by any of these considerations.

It is useless, therefore, to refer to the ability of the defendants to rebut the statutory presumption and carry the statutory burden of proof, and likewise useless, as a legal question, to refer to the difficulty of proving the crime or the fact that the circumstances surrounding the crime are within the knowledge of the defendant. No such excuse has ever saved any statute condemned by the Supreme Court. Moreover, the same excuse could be made by any statutory presumption of crime. *Hardly a criminal charge can be imagined in connection with which it could not be said that defendant had peculiarly within his knowledge facts which could show his guilt or innocence; and almost every crime involves difficulties of proof.* These are false quantities in measuring the sufficiency of a statutory presumption. The sole inquiry must be whether or not the crime itself or an essential element thereof is to be presumed without proof of the fact itself or of some other fact upon which a rational inference of guilt can be predicated.

It thus appears from the decisions of the Supreme Court of the United States, which of course are controlling on the question at issue, that the test to be applied is *not* whether or *not* defendant knows the fact *nor* whether the crime is difficult to prove, but *whether the statute is sustained by the rational connection which all cases require.*

The question involved is a very serious one, and an expression from this Court is necessary to limit the extent to which legislatures may go in shifting the burden of proof. An argument may be made that it will be impossible to make proof of ineligibility to citizenship if section 9a is held unconstitutional. The answer to this claim is

that section 9b has already been held constitutional by the Supreme Court of California, and the Supreme Court of the United States has refused to accept the case on the ground that no federal question is involved. Under section 9b, by proving that the alien is of a race ineligible to citizenship or that he belongs to such a race, the burden shifts to him to show that he is a citizen or is eligible, so the State is amply protected by section 9b.

Motion to Dismiss Order Allowing Appeal Should Be Denied.

The motion to dismiss upon the want of jurisdiction of the Supreme Court is on the grounds that the paper purporting to allow the appeal is irregular and uncertain, and not supported by sufficient grounds for appeal, and because the question upon which it is claimed the jurisdiction of the U. S. Supreme Court depends is so frivolous as not to need further argument. Appellants' statement as to jurisdiction, and the amendment to said statement, reference to which is hereby made, both show a substantial federal question is involved, and if there was any criticism of the original statement of jurisdiction, certainly that criticism was cured by the amendment to the statement of the grounds of jurisdiction which is now before the court. The authorities cited in the amendment to the statement as to jurisdiction amply show the jurisdiction of this Honorable Court to hear and determine the question, and show that a federal question is presented and is reviewable by this court.

Whether a state court denied rights asserted under local law protection guaranteed by the federal Constitu-

tion is a question on which the U. S. Supreme Court's judgment may be invoked.

Broad River Power Co. v. State of S. Carolina Ex. Rel. Daniel (1930), 50 S. Ct. 401, 281 U. S. 537, 74 L. Ed. 1023.

State court's opinion is not final on question arising under the federal Constitution.

Brinkerhoff Ferris Trust & Savings Co. v. Hill (1930), 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107, reversing (1929) 19 S. W. 2d 746, 323 Mo. 180.

Where the state court entertained the question of constitutionality of a state statute, but holding same valid, the U. S. Supreme Court has jurisdiction on certiorari.

Cumberland Coal Co. v. Bd. of Revision of Tax Assessments in Greene County (Va. 1931), 52 S. Ct. 48 reversing (1930), 302 Pa. 179.

State court's finding that ordinance fixing rates for water power did not impair prior contract is not conclusive on the U. S. Supreme Court.

John P. King Mfg. Co. v. City Council of Augusta (Ga. 1928); 48 S. Ct. 489; 277 U. S. 100; 72 L. Ed. 801.

Where a state statute is challenged in the state court under the due process clause, the case is properly before the Supreme Court of the United States.

Miller v. Schoene (Va. 1928), 48 S. Ct. 246; 276 U. S. 272; 72 L. Ed. 568.

The statutory provisions sustaining the jurisdiction of the U. S. Supreme Court in this case is found in section 344 of U. S. Code, Annotated, Chap. 9, Title 28 (Judicial Code, section 237, amended).

We wish to apologize to this Honorable Court for the crude way in which this matter is presented in this brief, but Your Honorable Court advanced this case for hearing and we did not receive notice of the advancement until November 6, 1933. At the present writing we have not yet received a copy of the record, and have not been able to refer to the book and page thereof, but the record is very small, and I hope this omission will not cause the court inconvenience. In order that appellee may have ample time to file his brief, we were required to rush the preparation of this brief, and it is not as we would have presented it, had we had more time.

In conclusion, we respectfully submit that the decisions set forth in this brief, particularly those of the United States Supreme Court, show conclusively that section 9a of the Alien Land Act of California and section 1983 of the Code of Civil Procedure are unconstitutional and void, and that defendants were not accorded due process of law. The judgment and the decision of the Supreme Court of the state of California should therefore be reversed.

Respectfully submitted,

J. MARION WRIGHT,
Counsel for Appellants.